United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2337

12/30

To be argued by

MARTIN JAY SIEGEL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA,

Appellee

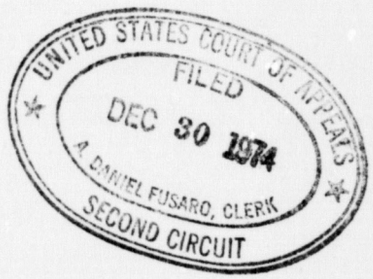
-against-

Docket No. 74-2337

SIMON MORANDI,

Appellant

----------x



BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Appellee,

-against-

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Appellant

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ISSUES PRESENTED

1) The Trial Court improperly denied Defendant-Appellant's Motion to Suppress certain items of contraband.

2) The Trial Judge incorrectly denied Defendant-Appellant's Motion to dismiss Counts 1,2 and 4 after the government's case.

3) Was there an abuse of discretion by the Trial Judge at the time of sentencing of the Defendant-Appellant

STATEMENT PURSUANT TO RULE 28(3)

SIMON MORANDI appeals from a judgment of the United States District Court for the Southern District of New York,

rendered on Sept. 19, 1974, convicting him after trial (COOPER, J. and a jury) of Conspiracy to violate the Federal Narcotics Laws, Possession of cocaine with intent to distribute and Possession of a firearm during the commission of a felony. Mr. Morandi was sentenced to concurrent three year terms on each count to be followed by a special parole term of three years.

Simon Morandi was indicted together with Keith Copen, William Standbridge and Carlos Paz. Keith Copen was sentenced to a term of probation; William Standbridge's sentenced has been delayed pending a complete psychiatric examination and; Carlos Paz is a fugitive from Justice.

STATEMENT OF THE FACTS.

Agent William Lundsford of the Drug Enforcement Administration purchased four ounces of cocaine from William Standbridge and Keith Copen on Nov. 2, 1973 at the latters apt. It was assumed by all parties, that a subsequent sale for a larger amount was to take place in the very near future.

The transaction was scheduled for Nov. 13, 1973 at the Blue Bay Diner in Queens, NY. Shortly after 6pm at the aforementioned location, Standbridge arrived and had a

conversation with Lundsford. Standbridge stated that he had the cocaine in his apt. and wanted to "make the deal there", because he felt that there were too many people at the diner (T-9*). When Agent Lundsford refused, Standbridge then suggested that they meet at the parking lot of the Northern Cross Diner later that same evening, and deliver the cocaine.

While Agent Lundsford was waiting at the Northern Cross Diner, he observed Standbridge drive through the area with an unidentified male on two or three occasions, but did not stop.

At 7:30pm that same evening, Lundsford spoke by telephone with Copen to express his disappointment with the failure of the deal to materialize. Later, Copen informed Lundsford that the transaction would occur definitely the next day at a room in the Columbia Pres. Hospital.

On Nov. 14 at approximately 2:30 surveillance agents observed Standbridge driving in the area of the hospital with two individuals, who were later identified as the defendant Carlos Paz and the appellant Simon Morandi. Mr. Paz was in the passenger seat and Mr. Morandi was located in the back seat. The agents then lost sight of the vehicles with its

*T represents page numbers of the official transcript

three occupants.

Approximately fifteen minutes later, Agent Lundsford who was at DEA offices on W. 57th St, telephoned Copen at the hospital and asked if the cocaine had arrived. Copen responded in the affirmative. Agent Lundsford then wanted to know who the two individuals were in the car with Standbridge. He expressed reservations about the deal because as he stated " it looks like you have the entire Spanish Army ou there". Whereupon Standbridge indicated to Lundsford that the individuals in the car were Columbians and his protection so that nothing goes wrong(T-14). Shortly after Lundsford terminated the telephone conversation, Federal Agents arrested Standbridge on the hospital grounds in possession of nine ounces of cocaine. In addition Standbridge was found in possession of a gun which was introduced against the Appellant(T-118, 126,7).

After Standbridge was arrested Federal Agents scoured the area to try and locate his car. Approximately 2½ hours after the agents lost sight of the car, it was located 3 blocks from the hospital. The vehicle and the occupants were placed under observation for a period of thirty minutes. At 5:20pm Federal Agents surrounded the car with drawn guns and ordered them to exit the car with their hands over

their head..

Subsequent to the arrest of the occupants Paz and Morandi, a search of the vehicle was conducted at the scene by Agent Keith Logan. A pistol, identical in make and model to that possessed by Standbridge,was discovered wedged in the front seat, not in plain view.

During post arrest procedures, the appellant was found in possession of a miniscule amount of cocaine. He was not indicted or charged with possession of that amount. In addition there was no showing of any similarity between the cocaine seized from Standbridge and that subsistance.

The defendants Copen and Standbridge pleaded guilty before trial. The defendant Carlos Paz failed to appear in Court and a bench warrant was subsequently issued.

Prior to the commencement of trial, an evidentary hearing was held on appellant's motion to suppress certain items of contraband. At the conclusion of the hearing the Trial Judge denied appellant's motion and found that there was probale cause to arrest the appellant and search the vehicle(T 70-1).

The appellant Morandi was found guilty of conspiracy to violate the federal narcotics laws, possession of nine

ounces of cocaine and possession of a firearm. At the conclusion of the government's case, defense counsel moved for a judgment of acquittal on all counts. The Trial Judge denied the motion. The appellant offered no evidence but rested on the presumption of innocence accorded every defendant in our Criminal Justice System. Mr. Morandi was found guilty.

POINT 1

THE TRIAL COURT IMPROPERLY DENIED DEFENDANT-APPELLANT'S MOTION TO SUPPRESS CERTAIN ITEMS OF CONTRABAND.

The defendant-appellant Simon Morandi contends that the Trial Judge improperly denied his motion to suppress. The key underlying issue involved is whether there was sufficient probable cause to arrest the appellant for violation of the federal narcotics laws and to search the vehicle where he was located. Agent Michael Grimes testified (T-40) that when he approached the vehicle he had every intention of placing appellant under arrest for violation of the federal narcotics laws. However a reading of the record clearly reveals an absence of any legal basis for the arrest and resulting search.

The evidence which the prosecution had hoped would connect the appellant with any wrongdoing is that Morandi was observed riding as a passenger in a car operated by Standbridge at 2:00pm. Subsequently at 4:50pm, Morandi was observed in the same car, parked at a location 3 blocks from where Standbridge and Copen were engaged in a narcotics transaction with Agent Logan. Morandi's conduct in the auto was limited solely to reading a magazine. There is no evidence within the

confines of the record of the appellant engaging in any criminal, suspicious or nefarious conduct prior to his arrest. The testimony from the lips of the agents speak of Morandi as just an innocent passenger with no hint of involvement in crime. The law on this point is well settled: that innocent conduct in and of itself cannot give sufficient grounds to establish probable cause. U.S v. DiRe 332 US 581(1948), U.S. v. Gonzalez 362 F. supp. 415, 421(1973).

The evidence is clear that appellant was not known nor heard of by the agents before he was observed in Standbridge's car. Probable cause is determined by the sum total of information, observations and reports known to the arresting officers. Raffone v. Adams 468 F2d 860(2nd Cir. 1972), U.S. v. Failla 343 F. Supp831(WDNY,1971). In the instant case, it is argued that the agents lacked a miniscule amount of probable cause to arrest the appellant and search the vehicle.

The record is devoid of any evidence tending to show that the weapon seized in the subject car and the small amount of cocaine seized from Morandi were in plain view. It is readily conceded that if the items of contraband recovered from the area of the appellant were in plain view to the agents, prior to the arrest, probable cause would exist. Chimel v. California 395 U.S. 752(1969). However no such evidence was adduced at

trial.

It is urged that this Court apply the applicable law relied upon by the appellant and reverse the ruling made by the lower Court on the motion to suppress.

POINT II

THE TRIAL JUDGE INCORRECTLY DENIED DEFENDANT-APPELLANT'S MOTION TO DISMISS COUNTS 1,2 and 4 AFTER THE GOVERNMENT'S DIRECT CASE.

The Defendant-Appellant readily concedes that the government, during its direct case, proved the existence of a conspiracy consisting of Standbridge, Copen and Agent Lundsford. However the key issue in this point is did they show a connection, by independant evidence of appellant Morandi with this unlawful and unwholly partnership.

In order to determine the sufficiency of the conviction, the evidence must be viewed in a light most favorable to the government. Glasser v. U.S. 315 U.S. 60(1942), U.S. v. Tutino 269 F2nd 488(2nd Cir. 1959). Viewing the evidence in a position as stated, we find it flimsy at best. The evidence connecting the appellant Morandi is as follows:

a) Appellant was observed riding as a passenger in Standbridge's car, on the day of his arrest, Nov. 14, 1973.

b) Approximately 1½ hours after Standbridge was arrested, appellant was observed as an occupant in Standbridge's parked car, some three blocks from the hospital where he was arrested.

c) During Standbridge's conversations with Lundsford on Nov. 14, he alluded to certain individuals as his connection and protection as being Columbians. The appellant Morandi is

from Venezuala and the defendant Paz is from Peru.

Subsequent to the arrest of Paz and Morandi, a search of the vehicle revealed a gun, identical in make and model as that possessed by Standbridge at the time of arrest. This pistol was admitted in evidence against the strenuous objection of counsel. The reason given by the Trial Judge in permitting it, stated that it was part of the conspiracy and therefore admissible.(T-118,126-7) This it is contended is error in and of itself and merits reversal. U.S. v. Gearney 417 F. 2nd 1116(2nd Cir.1969). U.S. v. Mach 112 F 2nd 290,292 (2nd Cir. 1940).

The record is barren of any evidence tending to show that appellant had any connection with the narcotics Standbridge possessed, which is the subject of Count 2 in the indictment. In order to convict the appellant of constructively possessing the cocaine in question their has to be some connection between Morandi and the narcotics. U.S. v. Cornish 491 F 2nd 80 (1st Cir. 1974), U.S. v. Purvin 486 F 2nd. 1363(2 nd Cir. 1973), U.S. v. Wright 466 F 2nd 1256 (2nd Cir. 1972).

In the Cornish case supra, the government proved that appellant was a party to a conversation about the narcotics where he conceded partial ownership. Although he was never seen in

actual possession, the fact that he acknowledged possession was deemed sufficient. In the instant case, we have no statement by the appellant, no observation was made of him with the narcotics or for that matter any other connection with that narcotics.

The evidence in the record is equally non-existent as far as appellant connection with the conspiracy. To sustain the conviction of the appellant, a showing must be made, by independant evidence, from the record that he wilfully and intentionally had become part of the conspiracy and had aided in the furtherance of some of its aims. U.S. v. Gearney, supra. Without that, the conviction must fall. U.S. v. Hysohion 448 F 2nd 343(2nd 1971), U.S. v. Gallishaw 428 F2nd 760,763(2nd Cir. 1970), Ingram v. U.S. 360 US 672, 678(1959),U.S. Schwartz 464 F 2nd 499, 510(2nd Cir, 1972).

The law is further well settled that in order to fasten guilt on one accused of being a co-conspirator, it is necessary to prove that he actively participated in the conspiracy charged. Mere association with a conspirator is insufficient to entangle an innocent party into the evil web of a criminal conspiracy. U.S. v. Mack supra, U.S. v. Mendez 496 F 2nd 128 (5th Cir. 1974), Jones v. U.S. 365 F 2nd 87(10th Cir 1966),US v. Butler 494 F 2nd 1246(10th Cir, 1974).

Here the government failed to sustain their burden of proving appellant connection, with the Standbridge-Copen-Lundsford conspiracy. The government attempted, with no success to bind appellant into the conspiracy because of his passenger status in Standbridge's car. This of course is error and certainly not the law. The appellant therefore urges that the instant case be reversed and the indictment be dismissed.

POINT III

WAS THERE AN ABUSE OF DISCRETION BY THE TRIAL JUDGE AT THE TIME OF SENTENCING OF THE DEFENDANT-APPELLANT.

The defendant-appellant contends that in the event this Court in its ultimate wisdom and discretion should decide to affirm the conviction, than it urged that the appellant be re-sentenced.

The appellant, who was twenty-one years of age, was eligible for sentencing under the Federal Youth Correction Act, 18 USC 5005-10. However, at the time of sentencing when such treatment was requested by Counsel for Morandi, (T-275,281),the Trial Judge denied it. No finding was made by the Trial Judge as to whether the appellant would benefit from treatment under the act. The law on this point is quite clear; at the time of sentencing, the sentencing Judge must make a finding as to whether an individual would benefit from sentencing under the Federal Youth Correction Act. If the lower Court fails to makes this determination, the appellant must be re-sentenced. U.S. v. Kaylor 491 F 2nd 1133 (2nd Cir. 1974), Dorszynski v. U.S., 15 Crl 3270 (Decided June. 26, 1974, SCOTUS).

In addition approximately six weeks prior to sen-

tencing Counsel requested that he be allowed to view the pre-sentence report. That request(App. Pg 7) and denial (App. Pg.8). A subsequent request was made at sentencing which was also denied(T-273-4). The Court in denying Counsel's request stated that it was the policy not to show the report but only to advise defendant-appellant of certain negative aspects of the said report. It is contended that this is error.

This circuit as well as others have held that showing the pre-sentence report is discretionary and a general policy prohibiting Counsel for defendants from viewing the report is an abuse of judical discretion. U.S. v. Kaylor, supra, U.S. v. Brown 470 F 2nd 285(2nd Cir,1972), U.S. v. Rosner, 485 F 2nd 1230(2nd Cir. 1973), U.S. v. Wilson 450 F 2nd 495 (4th Cir 1971).

Therefore this Court is urged that in the event of an affirmance of this matter, that the case be remanded to the District Court for re-sentencing.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED WITH INSTRUCTIONS TO DISMISS THE INDICTMENT WITH PREJUDICE. ALTERNATIVELY, THE CASE SHOULD BE REMANDED WITH INSTRUCTIONS TO RE-SENTENCE THE DEFENDANT-APPELLANT.

Respectfully submitted,

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